

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ISAAC LEVIN	:	DETERMINATION
	:	DTA NO. 810327
For Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1985 through 1986	:	

Petitioner, Isaac Levin, 960 Cliffside Avenue, North Woodmere, New York 11581, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1985 through 1986.

On March 16, 1993 and March 17, 1993, petitioner, appearing pro se, and the Division of Taxation, appearing by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel), respectively, executed a consent to have the controversy determined on submission without hearing. Petitioner filed a brief on May 24, 1993, and the Division of Taxation filed a brief on June 1, 1993. Petitioner's reply brief was filed on July 7, 1993 which commenced the six-month statutory period for issuance of a determination. After due consideration of the record Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner may be held liable for the penalty asserted against him pursuant to Tax Law § 685(g).

II. Whether the failure of the Division of Taxation to file a claim for unpaid withholding taxes in a bankruptcy proceeding involving MactekIndustries Corporation bars it from asserting a penalty against petitioner, the corporation's primary officer, under Tax Law § 685(g).

FINDINGS OF FACT

The Division of Taxation ("Division") issued to petitioner, Isaac Levin, a Notice of Deficiency, dated August 25, 1989, asserting penalties in the amount of \$24,126.11 under Tax

Law § 685(g). At the same time, the Division issued to petitioner a Statement of Deficiency which explained that petitioner was liable for a penalty equal to the total amount of tax due from Mactek Industries Corporation ("Mactek") for the periods May 1, 1985 through December 31, 1985 and January 1, 1986 through December 31, 1986. Following a conference, the Division issued a Conciliation Order dated September 27, 1991 sustaining the statutory notice.

Petitioner was the president of Mactek. Mactek filed a voluntary petition in bankruptcy under Chapter 11 of title 11 of the United States Code in June 1987. It had previously filed a petition under Chapter 7. The Division filed a claim for taxes due from Mactek, dated December 20, 1991, in the United States Bankruptcy Court in Brooklyn. Included in that claim were withholding taxes in the amount of \$24,126.11 for the periods in issue here. Apparently, there were no funds available with which to pay the Division's claim.

The Division's claim for taxes due from Mactek is based on withholding tax returns filed without remittance of the tax shown as due. For the year 1986, Mactek issued wage and tax statements showing total taxes withheld of \$10,403.00. None of this amount was paid over to the Division. For the year 1985, Mactek issued withholding wage and tax statements showing total taxes withheld of \$14,629.00. The Division asserts that \$905.89 was paid over to the Division.

The Division asserts that it was not listed as a creditor when Mactek filed its bankruptcy petition in 1987 and, therefore, was unaware of the proceeding and unable to file a claim against Mactek at the outset of the bankruptcy proceeding. Petitioner does not dispute that the Division was initially omitted from the bankruptcy filing; however, petitioner notes that the Division was made aware of the existence of the bankruptcy proceeding in 1989 and still did not file a claim in bankruptcy court until 1991.

CONCLUSIONS OF LAW

A. Tax Law § 689(e) provides that, except for certain specified issues not pertinent here, the burden of proof is upon the petitioner in any case before the Tax Appeals Tribunal under article 22 of the Tax Law (see also, Matter of Silverman v. New York State Tax Commn., 106

AD2d 761, 483 NYS2d 793). Moreover, it has been held repeatedly that a presumption of correctness attaches to a notice of deficiency properly issued by the Division (Matter of Leogrande v. Tax Appeals Tribunal, 187 AD2d 768, 589 NYS2d 383, lv denied 81 NY2d 704, 595 NYS2d 398; Matter of Tavalacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174, 175; Matter of Denn, Tax Appeals Tribunal, October 25, 1990). Accordingly, it was essential for petitioner to offer evidence to support his various positions as put forth in his briefs. He offered no evidence. The briefs themselves contain arguments of fact and law but very little in the way of factual material. As a consequence, petitioner has failed to carry his burden of proof to overcome the presumption of correctness which attaches to the notice of deficiency. Each of the points made by petitioner will be addressed separately.

In its brief, the Division states: "During 1985 and 1986, while experiencing financial difficulties, Mactek Industries Corp. filed partially paid withholding tax returns". The brief later provides a calculation showing payment of tax in the amount of \$905.89. Seizing upon the Division's reference to "partially paid" returns, petitioner claims that he should be given credit for any taxes which were paid by Mactek. Petitioner provides no evidence that Mactek paid any amount for which it was not given credit. I cannot assume, as does petitioner, that Mactek paid some amount of tax which the Division has failed to account for.

Petitioner claims that he was irreparably damaged by the Division's failure to file a claim for taxes in the bankruptcy proceeding. He asserts that 50 percent of the tax liability would have been paid, if the Division had filed a claim. He does not claim that the Division was notified of the bankruptcy filing in 1987, when the petition in bankruptcy was originally filed. However, he notes that the Division became aware of the filing in 1989 (apparently as a result of information provided to the Division at the conciliation conference) and did not file a claim until 1991. According to petitioner, this demonstrates that the Division failed to take steps to enforce its claim against the corporation at a time when it was able to do so. Petitioner's arguments are purely speculative. I have no way of knowing what would have happened if the Division had filed a claim in the bankruptcy proceeding in 1989. I cannot cancel the penalty

based on speculation about what might have occurred had the Division filed such a claim. The record simply shows that Mactek failed to pay over withholding taxes due to the State.

Tax Law § 685(g) imposes liability on those persons responsible for the collection and remittance of withholding taxes who willfully fail to collect or remit such funds. Section 685(g) provides as follows:

"Willful failure to collect and pay over tax.--Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No addition to tax under subsections (b) or (e) shall be imposed for any offense to which this subsection applies. The tax commission shall have the power, in its discretion, to waive, reduce or compromise any penalty under this subsection."

Tax Law § 685(n) defines the term "person" as it is used in section 685(g) as follows:

"the term person includes an individual, corporation or partnership or an officer or employee of any corporation . . . , or a member or employee of any partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

The question of whether someone is a "person" required to collect and pay over withholding taxes is a factual one. Factors which should be considered are whether the taxpayer signed the tax return, derived a substantial part of his income from the corporation, or had the right to hire and fire employees (Matter of Malkin v. Tully, 65 AD2d 228, 412 NYS2d 186). Other pertinent areas of inquiry include the person's official duties, the amount of corporation stock he owned, and his authority to pay corporate obligations (Matter of Amengual v. State Tax Commn., 95 AD2d 949, 464 NYS2d 272, 273).

Petitioner has provided no information which would support a finding that he was not a person required to collect and pay over withholding taxes on behalf of Mactek. Petitioner claims that he "lacked the intent required in order to justify the imposition of the penalty for willful failure to withhold and pay employment taxes". In his view, the fact that the Division was not listed as a creditor on Mactek's bankruptcy filings is evidence that he did not know that withholding taxes had not been paid. He asserts (without any evidence) that payment did accompany the withholding tax returns and states:

"By negative implication, it is inconceivable that the petitioner would not have listed these tax liabilities on the corporation's bankruptcy schedules -- had he known of their existence -- since had they been listed on the schedules, the Department of Taxation would have been paid on a priority basis from the corporation's bankruptcy estate."

Petitioner also states that unemployment claims were paid as a result of the Department of Labor having been listed as a creditor.¹ From all of this, petitioner requests an inference that he did not "willfully" fail to pay over withholding taxes. The record does not support such an inference. Without any facts explaining the circumstances surrounding the Mactek bankruptcy proceeding, petitioner's duties and responsibilities for Mactek, or other information regarding his connection with Mactek, petitioner's statements are an insufficient basis upon which to cancel the penalty asserted.

B. The petition of Isaac Levin is denied, and the Notice of Deficiency dated August 25, 1989 is sustained.

DATED: Troy, New York
September 23, 1993

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE

¹In his brief, petitioner refers to a letter to the Department of Labor dated December 2, 1992, but no such letter was submitted in evidence.